No. 76-1461

In The Supreme Court of The United States

April Term, 1977

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

THEODORE WARE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. _____

THEODORE WARE,

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vs.

UNITED STATES OF AMERICA,

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioner, Theodore Ware, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit entered in the above case January 31, 1977, revised and corrected March 22, 1977.

OPINION BELOW

The opinion of the Court of Appeals of March 22, 1977, is not reported at this date, but is set forth verbatim in Appendix "A" at pages 16 through 26.

JURISDICTION

On January 31, 1977, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of Petitioner for conspiracy to possess heroin and cocaine with intent to distribute, in violation of 21 U.S.C. Sections 841(a)(1) and 846, revised and corrected on March 22, 1977. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), and Rule 22(2), Rules of the Supreme Court.

QUESTION PRESENTED

Whether Petitioner's Sixth Amendment rights were violated by the refusal of the Court to order the unindicted co-conspirator to reveal the source of his narcotics.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

STATEMENT

Petitioner and other defendants were allegedly involved in a complex operation involving the smuggling and distribution of heroin and cocaine. The narcotics originated in Mexico under the control of one Raul Leon-Aispuro. Couriers of Aispuro would smuggle the narcotics across the border into Southern California. The narcotics were then delivered to the defendants or to Edward Perry (cousin of co-defendant Perry) who acted as warehouseman, wholesaler, and distributor. There was evidence that Petitioner Ware acted as a satellite distributor, obtaining narcotics either from Edward Perry or from couriers working for him.

Larry Jackson testified as a government witness in exchange for help in his own criminal cases (714-21). [All page references herein are to the reporter's transcript.] Jackson's testimony revealed that he had known Petitioner Ware for five or six years (625). In the early fall of 1974 he came to Los Angeles with Elise Williams from Texas (625-26). They stayed in motels until their baby was born on October 12, 1974 (626). When the baby was born they all moved into the Ware residence (626-27). They did not pay any rent while at the residence, although Jackson loaned Ware $900 around the time that he moved in (811, 860-61).

A week after moving in, Jackson met Ed Perry at a Washateria, and he took him over to Ware's residence (627). Perry told Jackson that he had access to any amount of narcotics that a person

could want (628). Jackson took $5,000 which he had accumulated from some forgery and invested it with Perry in order to get a return of $10,000 (629). The same night Perry and Jackson went down to Mexico where Jackson met Raul Leon-Aispuro (630).

Thereafter, Perry again came to Ware's house (632). Perry shared some cocaine with the people at the house and left there four ounces of heroin (633). Petitioner Ware said he could sell it for Perry (634). A few days later, Jackson moved Miss Williams and their baby into Perry's residence (638). Just before the move was completed, Miss Williams transported a pound of cocaine from San Diego to Los Angeles (639). Jackson and Ware picked her up at Los Angeles Airport and took her back to Ware's house (640). At the house, they snorted some of the cocaine. Petitioner Ware said that he did not want to have narcotics in his house, so Jackson stashed it behind the house in an alley (640-41).

While living at the Ware residence, Jackson made and received long distance calls regarding narcotics (811). Dope was snorted at the house (859). Friends brought narcotics by (885). Jackson refused to identify the friends that brought narcotics by the residence, and the Court refused to order him to give those names (885). Ed Perry discussed with Jackson his dope dealings with his cousin, co-defendant Ted Perry (669).

In December, 1974, Larry Jackson, one Murray Jackson, and Petitioner Ware

had a conversation in Ware's residence. Elise Williams was present at the time (684). Murray Jackson said he wanted to buy some narcotics. Ware said he could obtain some narcotics and that Larry Jackson could get it from Ed Perry (686). On cross-examination, Jackson did not recall any specific discussion of narcotics (800-01). On redirect examination, Larry Jackson testified that Murray Jackson said he had connections to get 20 ounces of narcotics (856).

Miss Williams cooperated with the government as a witness because of her own legal problems (551). Miss Williams first met Ed Perry in Chinatown in front of a Japanese restaurant in Los Angeles (484). At that time Jackson and Perry exchanged phone numbers and addresses (484-85). Thereafter, Perry came over to the Ware household (486). Perry passed around one package of cocaine which was used up and left a package of heroin with Petitioner Ware on consignment (486-89, 553-54).

About a week later, Perry came by the Ware residence again. Miss Williams and Jackson were present. Perry asked Petitioner Ware for the money for the narcotics he had given him (496-97). Perry agreed to supply Ware with more heroin (499). Jackson testified he had no recollection of this transaction (807). Petitioner Ware stated that although Perry had brought some drugs to the Ware household, Ware had told Perry to keep the drugs and had not agreed to sell any.

Thereafter, Williams, Jackson, and

their daughter moved to Perry's residence in La Jolla , California (501).

During the first week of November, 1974, Miss Williams received a package of cocaine from Perry in La Jolla. She delivered it on PSA Airlines to defendant Jackson and Petitioner Ware at the Los Angeles Airport (512-13, 1146-47). During the drive back to Ware's residence, Jackson revealed some cocaine. When they reached the residence, Petitioner Ware told Jackson to remove the drugs from the house (1149-50). Later that evening Mr. Jackson and Miss Williams returned to the Perry residence in La Jolla (516).

Adrian Foster, called by the defense, testified that he had known Petitioner Ware since February of 1970 when they met in Texas (1100-01). During the next few years, Mr. Foster had visited Ware several times in California and stayed with him. Their relationship was based on friendship (1101). Mr. Foster worked as an inventory control clerk for the City of Inglewood, California, and studied law at the University of Southern California (1102). He moved to California the week after Labor Day, 1974, and moved in with Mr. and Mrs. Ware at a house they owned at 10305 Biran Avenue in Inglewood (1103). At the end of September, 1974, Mr. and Mrs. Ware moved into 3928 West 112 Street in Inglewood. Shortly thereafter, Mr. Foster moved into the Zephyer Motel near Ware's new residence (1103-04). Mr. Foster continued to eat meals at the Ware residence (1104-05). During that period of time, Ware was a salesman for Drapery Carpet

Kingdom (1109). During the fall, Mr. Foster was looking for employment in the Los Angeles area and he used Ware's home as a base of operations (1106). During October, he saw Elise Williams and Larry Jackson at the house on a daily basis (1106). Mr. Foster saw narcotics at the house on only one occasion. At that time Jackson showed Ware some cocaine. Ware told Jackson to remove the substance from his home, which Jackson did (1108-09).

Petitioner Ware testified that he met Jackson in December, 1973, in Texas. He saw Jackson again in October, 1974, when he invited Jackson, Miss Williams, and their baby to stay with him because they had no place to stay (1132-33). They moved out in November, 1974 (1133). While the couple lived with Ware they had complete access to the house, food, and telephone (1133-34). Ware had only two financial transactions with Jackson. On one occasion he borrowed $100 toward the purchase of a stove and refrigerator. The second time Jackson gave him $800 toward the rental of the vacant Biran Avenue house for two months' rent (1134). Williams and Jackson made quite a few long distance telephone calls while they stayed at the residence (1138). Frequently Williams made calls to attempt to locate Jackson (1139). Of the exhibits seized at Ware's residence, consisting of personal telephone books, none are Petitioner Ware's or his wife's (1141-43). In the opinion of Ralph Schoonover, a detective sergeant of the San Diego Police Department, these exhibits did not contain the writing of either Mr. or Mrs. Ware (1193-1202).

In December of 1974, Ware received a visit from Murray or Larry Jackson regarding the use of Ware's property as security for Williams' bail. There was no discussion of narcotics (1144-45).

REASON FOR GRANTING THE WRIT

To resolve the claim of Petitioner that the failure of the trial court to order the unindicted co-conspirator Jackson to reveal the source of his narcotics violated the petitioner's Sixth Amendment right to a fair trial, an effective and informed defense, and his right to be confronted with the witnesses against him.

An important part of the government evidence connecting Petitioner Ware with the alleged conspiracy was the testimony of Larry Jackson, an unindicted co-conspirator. Jackson testified that a variety of individuals, including several of his friends, came by Petitioner's house and used narcotics (885). In pertinent part, that testimony was as follows:

> A. . . . there were people coming by the house, either his [Ware's] friends or some of his wife's friends or some of my friends, but somebody would come by the house and, generally, everybody that came by the house, if they did not have some grass to smoke, they had a bag of heroin or a bag of cocaine or something and it was spent up.
>
> Q. Was it sometimes your

friends that came and brought narcotics by the house?

A. One or two of them.

Q. Which of those friends were they?

A. By name, sir?

Q. Please.

A. I will not do that. People that are not here on trial, and I am not going to call their names, but they were just friends of mine who came by the house. There was one or two of them, because I didn't have that many friends.

The Court did not order the witness to respond.

(887):

> MR. BECHEFSKY: Your Honor, the witness testified that he refused to give those names and I request the Court to require that he give us those names.
>
> THE COURT: I will not do that. I do not think it is relevant.
>
> MR. BECHEFSKY: Well, I think it's relevant, and may I argue the point?
>
> THE COURT: No, Mr. Bechefsky. I will not make such an order.

The Court later permitted Williams to answer a similar question, commenting, "I have changed my mind." (1029) Her testimony, however, was vague and inconsistent (1029, 1053). In any event she was not as involved in the transactions as Larry Jackson and could not answer for him.

Jackson and Williams were admittedly involved in narcotic transactions. They were testifying for the government to help themselves. It was Ware's theory that they were dealing with people other than himself. Ware denied being involved in narcotic transactions. He had allowed Williams and Jackson to share his home because they had nowhere else to go. Jackson's answer to the defense questions would have revealed the identity of other people with whom he had dealt narcotics. This testimony might have led to the admission that Jackson and Williams had actually dealt with other individuals and not with Petitioner Ware. The identity of individuals who could have proved this could have been elicited. This testimony was crucial and the Court reversed its holding when Miss Williams testified. (See above.)

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, . . . and to have the assistance of counsel for his defense."

It is an elementary principle of our constitutional law that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. Pointer v. Texas, 308 U.S. 400, 408 (1964); Smith v. Illinois, 390 U.S. 129 (1967). No one experienced in the trial of criminal defendants would deny the value of cross-examination in exposing falsehood and eliciting the truth from the mouth of a less-than-forthright witness. The Framers of our Constitution recognized this fundamental principle through the enactment of the Sixth Amendment to our Constitution. All men's liberties are to be protected through the fundamental right to a fair trial and the right to be confronted with the witnesses against them. Decisions of this Court have consistently emphasized the necessity for cross-examination as a protection for the criminal defendant. See Davis v. Alaska, 415 U.S. 308 (1974); Alford v. United States, 282 U.S. 687 (1931).

In the present case, though, there was not a complete denial of all right of cross-examination. The Petitioner was denied the right to ask a principal government witness about information going to the very heart of his defense. That undue restriction effectively emasculated the right of cross-examination. United States v. Harris, 501 F.2d 1, 8 (9th Cir. 1974).

It is recognized that the trial judge is privileged to exercise reasonable control over the mode and order of cross-examination so to:

"1. make the interrogation and presentation effective for the ascertainment of the truth,

2. avoid needless consumption of time; and

3. protect the witnesses from harrassment or undue embarrassment."

Federal Rules of Evidence 611(a).

Even so, this principle should not be expanded to the extent of keeping from the jury relevant and important facts, bearing on the guilt of Petitioner and the reliability of crucial testimony. As stated in Smith v. Illinois, supra, 390 U.S. at 132:

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them . . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . . ." [Citing Alford v. United States, supra.]

A situation similar to the present case was considered in United States v. Miranda, 510 F.2d 385 (9th Cir. 1975). The defendant was on trial for embezzlement of funds from a bank. On cross-examination of the defendant's supervisor the defense inquired into the name of employees besides the defendant who had access to keys in the cabinet in which the cash alleged to have been embezzled was kept. The government's objection to this line of questioning was sustained. On appeal the defendant's conviction was reversed on the basis that the trial court's restriction upon defense counsel's cross-examination constituted an infringement of the fundamental right to confront witnesses. Id. at 387.

Writing for the Court, District Judge Enright stated:

"Although it is well established that the scope of cross-examination is within the discretion of the trial court, United States v. Bagsby, 489 F.2d 725 (9th Cir. 1973), it is equally well established that the right of cross-examination is a fundamental one embodied in the Sixth Amendment as the right of an accused to confront the witnesses against him. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1964). We believe that the trial court's restriction upon defense counsel's cross-examination constituted infringement of this fundamental right." 510 F.2d at 387.

Similarly, in the recent decision of United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976), the court reaffirmed this principle by stating:

> "Although the trial court has the obligation to see that an orderly trial is conducted and may properly restrict cross-examination when it becomes abusive or goes off on immaterial tangents, the court must at the same time exercise proper restraint and not be unduly restrictive. As recently stated in United States v. Harris, 501 F.2d 1, 9 (9th Cir. 1974):
>
> > It is essential, when the witness' credibility is critical to the Government's case, that defense counsel 'be given a maximum opportunity to test that credibility by exploring the witness' motivation for testifying.' (quoting from) United States v. Rodriguez, 439 F.2d 782, 783 (9th Cir. 1971)."

539 F.2d at 672.

In the present case there was little evidence connecting Petitioner Ware with the alleged conspiracy. The government relied primarily on the testimony of Jackson and Williams, two unindicted co-conspirators. Their testimony was inconsistent with each other in virtually every particular. Petitioner Ware vehemently denied the allegations. A review of the testimony of Jackson and Williams reveals that

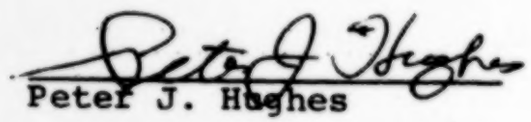
Williams testified that Perry brought heroin to the Ware residence twice (486-89, 553-54, 498-99). Jackson testified that it was once (807). Jackson testified that he discussed a heroin transaction in the presence of Ware, Williams, and Murray Jackson (684-86). Williams did not testify about such a transaction. Much of the testimony related to cocaine. No cocaine violations were charged. Other inconsistencies appeared regarding the travel of Williams to Los Angeles.

In view of these inconsistencies and the vehement denial of the Petitioner regarding his involvement in these narcotic transactions, there is little doubt that the Court should have ordered Jackson to respond to defense counsel's question. The failure to do so has resulted in the denial of the Petitioner's fundamental constitutional rights to a fair trial and a well-informed defense.

CONCLUSION

For the foregoing reasons, Petitioner Theodore Ware respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Dated: Feb. 24, 1977 Respectfully submitted,



Peter J. Hughes

Virginia Graham Bonar,
Certified Legal Intern

APPENDIX

The opinion filed herein on January 31, 1977, is withdrawn and the attached Revised and Corrected Opinion, filed March 22, 1977, is herewith substituted.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Luttetus PERRY, a/k/a Ted Perry,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Warren Stephen BRADLEY,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Theodore WARE, a/k/a "Teed" a/k/a "Fish", Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Brian WINTERS,
Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Michael Burke ERWIN,
Defendnat-Appellant.

Nos. 75-3737, 75-3743, 75-3738,
76-1314 and 75-3662.

United States Court of Appeals,
Ninth Circuit.

March 22, 1977.

Defendants were convicted before the United States District Court for the Southern District of California, Leland C. Nielsen, J., of conspiracy to possess heroin and cocaine with intent to distribute, and they appealed. The Court of Appeals, J. Blaine Anderson, Circuit Judge, held that trial court did not abuse discretion by not making further inquiry of jurors on voir dire as to any bias or preconceived opinion or by failing to give defense an additional peremptory challenge; that evidence established that defendants, allegedly at the retail end of alleged large narcotics smuggling and distribution organization, were members of the general conspiracy charged in the indictment; that finding that jury could rationally conclude that there was one general conspiracy and that defendants, allegedly at retail end of operation, were members of it, required conclusion of no variance between indictment and proof which prejudiced defendants' rights;

that permission granted prosecution witness to take stand in rebuttal and clarify claimed inconsistencies which had been presented was not abuse of discretion or prejudicial; and that defendants were not entitled to acquittal on general conspiracy charge just because some of them met singly without other defendants and conspired with them to carry out the overall common distribution plan.

Affirmed.

1. CRIMINAL LAW Key No. 1137(8)
Codefendant who waived trial by jury lacked standing to challenge any alleged errors relating to jury picked for trial of other defendants.

2. JURY Key No. 131(6,7), 136(4)
Trial court did not abuse discretion by not making further inquiry of jurors on voir dire as to any bias or preconceived opinions or by failing to give defense an additional peremptory challenge, following incident whereby one juror overheard ambiguous conversation, where record disclosed that any possibility of bias or partiality on part of any juror was at best speculative and trial court went to lengths necessary to provide a fair and impartial jury.

3. JURY Key No. 131(13)
Trial court was not obligated, on voir dire, to bring particular juror into chambers and inquire whether she formed an opinion based upon what

another juror had said to her, where other juror's reference to his daughter's use of marijuana did not relate to an opinion as to guilt or innocence of defendants but instead only concerned a personal problem.

4. CONSPIRACY Key No. 24

Government is not required to show direct contact or explicit agreement between defendants charged with conspiracy.

5. CONSPIRACY Key No. 40.1

In order for convictions to stand on charge of conspiracy to possess heroin and cocaine with intent to distribute, Government was required to produce enough evidence to show that each defendant knew or had reason to know the scope of the distribution and retail organization involved with the illegal narcotics and had reason to believe that their own benefits derived from the operation were dependent upon the success of the entire venture. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 1002, 1010, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 952, 960, 963.

6. CONSPIRACY Key No. 47(1)

Once a conspiracy has been found to exist, only slight evidence is necessary to connect a defendant to it.

7. CONSPIRACY Key No. 47(12)

In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, evidence established that defendants, allegedly at the retail end of alleged large narcotics smuggling and

distribution organization, were members of the general conspiracy charged in the indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 1002, 1010, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 952, 960, 963.

8. CRIMINAL LAW Key No. 1167(1)

In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, finding that jury could rationally conclude that there was one general conspiracy and that defendants, allegedly at retail end of operation, were members of it, required conclusion of no variance between indictment and proof which prejudiced defendants' rights, despite defendants' assertion that proof showed several conspiracies rather than one conspiracy resulting in a prejudicial variance requiring reversal. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§401(a)(1), 406, 1002, 1010, 1013, 21 U.S.C.A. §§ 841(a)(1), 846, 952, 960, 963.

9. WITNESSES Key No. 360, 394, 407

The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which trial judge necessarily has broad discretion.

10. WITNESSES Key No. 396(1)

In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, permission granted prosecution witness to take stand in rebuttal

and clarify claimed inconsistencies which had been presented was not abuse of discretion or prejudicial, since defendants were allowed great latitude in their cross-examination of witness into collateral matters to show claimed inconsistencies.

11. CRIMINAL LAW Key No. 662(1)
Right to confrontation of witnesses against defendant necessarily extends only to issues which are relevant to trial at hand.

12. CRIMINAL LAW Key No. 627.6(1)
In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, following direct testimony of co-conspirator as government witness that friends of defendant sometimes stopped by house and consumed narcotics, defense on cross-examination was not entitled to names of such friends, because they were irrelevant.

13. CONSPIRACY Key No. 28(3)
In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, Government was not required to prove that all of defendants met together at same time and ratified the illegal scheme; jury could properly have found that there were several different agreements involving the defendants, all of which would then connect the defendants to the general overall conspiracy as charged.

14. CONSPIRACY Key No. 48.1(4)
In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, defendants were not

entitled to acquittal on general conspiracy charge just because some of them met singly with other defendants and conspired with them to carry out the overall common distribution plan.

15. CONSPIRACY Key No. 48.2(1)
When possibility of a variance appears between indictment and trial proof, trial court should instruct jury on multiple conspiracies.

16. CRIMINAL LAW Key No. 1173.2(2)
In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, failure to instruct on multiple conspiracies caused no harm or prejudice to defendants, in absence of variance between indictment and trial proof.

Before ELY and ANDERSON, Circuit Judges, and SOLOMON,* District Judge.

OPINION

J. BLAINE ANDERSON, Circuit Judge:

On August 15, 1975, the Federal Grand Jury for the Southern District of California returned a criminal indictment charging defendants and nine others with conspiracy to illegally import heroin

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

and cocaine (Count One), and conspiracy to possess heroin and cocaine with intent to distribute (Count Two). [21 U.S.C. 952, 960, 963, 841(a)(1) and 846].

Defendants Perry, Bradley, Ware and Winters proceeded to jury trial on October 7, 1975. Defendant Erwin waived his right to a jury trial and his case was heard by the court. At the close of the government's case the defendants moved for acquittal. The trial court granted the motion as to Count One only.

On October 31, 1975, the jury found defendants guilty on Count Two. On November 3, 1975, the trial court found defendant Erwin guilty on Count Two.

Defendants appeal their convictions, raising numerous issues to be discussed infra. Jurisdiction rests with 28 U.S.C. 1291 and 1294. We affirm as to all defendants.

Briefly, the evidence, viewed favorably to the government, shows that all of these defendants were involved in a complex and sophisticated operation involving smuggling and distribution of illegal narcotics, primarily heroin and cocaine. The narcotics originated in Mexico under the control of one Raul Leon-Aispuro. Couriers of Aispuro would then smuggle the narcotics across the border into the United States, usually Southern California. The narcotics would then be delivered to the defendants or delivered to one Edward Perry (cousin of defendant Perry), who acted as warehouseman, wholesaler and distributor. The defendants in

this case played the role of satellite retailers in this operation. Some were located in different parts of the country. They obtained the narcotics either from Edward Perry himself or from couriers working for him. Other relevant facts will be presented as they relate to the issues raised.

I. VOIR DIRE OF THE JURY

During the jury selection process and after prospective jurors had been sworn, the trial court inquired of the jurors whether they would be able to follow his instructions on the law that was to govern. Juror Johnston expressed that while he would be willing to follow the law, he had already formed an opinion in the case. He felt this way from reading his morning paper and overhearing a conversation between two young ladies. When this juror expressed to the court that he felt he could not fairly try the case, he was dismissed.

Out of the presence of the jury, defense counsel requested that the court inquire of all the jurors whether they had heard any comments or remarks along those lines and, if so, what impact it would have on them as jurors.

The court responded:

> "I don't propose to do that gentlemen. I think that would be making a mountain out of a molehill. I have asked them about whether they could be fair and impartial and

whether they were willing to have their own case tried by jurors in the same frame of mind that they are now in. I think it would emphasize the situation and be very detrimental rather than beneficial. I think you are better off, all of us are, if we just act as if that had not happened." (R.T. 49-50).

Later, just as the jury was being excused for the day, Juror Zubrickey mentioned to the court that he had overheard a man talking in the hall. Zubrickey was questioned in chambers out of the presence of the jury. When asked if he had been talking to the previously-excused juror, he said no, but that he had been talking to another juror on the panel, a Barbara Van Dorn. Zubricky stated that he had "whispered" to Van Dorn that he had a daughter hooked on marijuana and that he hoped he wouldn't be picked for the jury because he "was not in favor of it at all." (R.T. 52). Zubricky stated that Van Dorn made no response, but was only listening. Zubricky was then released for cause. Defense counsel again requested that the court inquire of the jurors whether they had discussed the case or formed an opinion of the case based on anything said that day. The court refused because he didn't feel there was any reason for it. He also refused to give defense an additional peremptory challenge with which to challenge Juror Van Dorn.

[1] Defendants[1] now contend on

[1]Erwin lacks standing to challenge any alleged errors relating to the jury since he waived trial by jury.

appeal that the trial court committed reversible error by not making further inquiry of the jury, especially Juror Van Dorn, or giving the defense an additional peremptory challenge. Defendants also contend that the trial court erred by refusing to grant defendants' motion for a mistrial.

[2,3] We find no reversible error committed by the trial judge in his handling of the voir dire of the jury. As this court stated in United States v. Silverthorne, 430 F.2d 675, 678 (9th Cir. 1970), cert. den., 400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed.2d 633 (1971):

> "Appellate courts will not interfere with the manner in which the trial court conducted the voir dire examination unless there has been a clear abuse of discretion."

See also Ristaino v. Ross, 424 U.S. 589, 594, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976). We find no such abuse of discretion in this case which, it should be noted, does not involve substantial pretrial publicity. Compare United States v. Silverthorne, supra, with United States v. Polizzi, 500 F.2d 856, (9th Cir. 1974), cert. denied, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). The trial court went to the lengths necessary to provide a fair and impartial jury. He is the one closest to the situation and can best evaluate the proper method to determine if there is any bias or preconceived opinions held by the jury. He is best able to walk that fine line between first

questioning the jury to find bias and then later specifically requestioning the jury to the extent that confusion and bias are created in the jury by suggesting the existence of controversial issues which may or may not exist. See United States v. Polizzi, supra, at 880. The record reflects that any possibility of bias or partiality on the part of any juror is at best speculative. Initially, the court properly declined to inquire of the remaining members of the jury panel whether they also overheard the ambiguous conversation alluded to by Mr. Johnston. Johnston's comment had been made in open court before the jury panel, yet failed to evoke similar reactions from others. To delve into the possibility that others might have overheard the conversation would have been a fishing expedition that would have suggested to the panel the presence of highly prejudicial information. Mr. Zubricky's subsequent comments added nothing to what the trial judge already knew about the incident in the hallway; hence, he quite appropriately maintained his opinion that no significant event of pretrial publicity had occurred. Moreover, we do not believe that the court was obligated to bring Juror Van Dorn into chambers and inquire whether she formed an opinion based upon what Zubricky had said to her. The reference to his daughter's use of marijuana did not relate to an opinion as to guilt or innocence of the defendants, but rather only concerned a personal problem unfortunately shared, perhaps by many parents.

Thus, the trial court properly exercised his discretion in questioning the jury and denying the motion for a mistrial. The appellants were not deprived of a fair trial because of the situation presented on this record.

II. SUFFICIENCY OF THE EVIDENCE

[4,5] Defendants contend that the evidence produced at trial was insufficient to establish that they participated in the single conspiracy charged in the indictment. They argue that the government has not shown that each of the defendants worked directly with each other nor even shown that all of the defendants knew each other. However, under the law of this circuit such a showing is not necessary. The government is not required to show direct contact or explicit agreement between the defendants. For the convictions to stand, the government must produce enough evidence to show that each defendant knew or had reason to know the scope of the distribution and retail organization involved with the illegal narcotics, and had reason to believe that their own benefits derived from the operation were dependent upon the success of the entire venture.

The instant case closely parallels United States v. Baxter, 492 F.2d 150, (9th Cir. 1973), cert. denied, 416 U.S. 940, 94 S.Ct. 1945, 40 L.Ed.2d 292 (1974). In Baxter, we dealt with a factual situation very similar to the instant case; that is, a large narcotics smuggling and distribution organization. There, as here,

defendants were the retail end of the chain and they also contended that the evidence was insufficient to establish that the individual defendants participated in an overall conspiracy as charged in the indictment. In answer to this claim, we specifically stated:

> " . . . the Government did not, for the most part, prove direct contact and connivance between the defendant retailers. However, even though the defendant retailers did not directly conspire with each other in this over-all undertaking, if each knew, or had reason to know, that other retailers were involved with the Hernandez organization in a broad project for the smuggling, distribution and retail sale of narcotics, and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the over-all scheme. [citations omitted] This would be true even though the individual defendants were not aware of the identity, number or location of the other participating retailers."

492 F.2d at 158.

[6] Upon complete review of the record in this case, we find that the jury (and the trial judge in Erwin's case) could rationally conclude that there was a general conspiracy as charged in the indictment. Once a conspiracy has

been found to exist, only slight evidence is necessary to connect a defendant to it. United States v. See, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992, 95 S.Ct. 1428, 43 L.Ed.2d 673 (1975); United States v. Knight, 416 F.2d 1181, 1184 (9th Cir. 1969).

[7] When we view the evidence in the light most favorable to the government, as we must, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we find that it is amply sufficient to show that defendants were members of the general conspiracy charged in the indictment. For example, the record discloses that defendant Perry was a major narcotics trafficker in the Detroit, Michigan, area. On at least two different occasions defendant Perry accepted deliveries of narcotics from Edward Perry and once argued the method of payment for the narcotics over the telephone. He also personally contacted and met with Edward Perry on several different occasions.

As for defendant Bradley, the evidence sufficiently establishes that he was a prime member of the conspiracy. He was a courier of narcotics. He delivered them at least once to Salt Lake City. The record also discloses that Bradley twice accepted delivery of narcotics from another courier who was working for the Aispuro organization in Mexico, and, for a part of the time, he was a partner with wholesaler Edward Perry in the narcotics business.

The evidence also connects defendant Ware to the conspiracy and to Edward

Perry. On several different occasions narcotics were delivered to Ware by couriers of Edward Perry or by Edward Perry himself. Some of these were on "consignment" which indicates that Ware was a trusted retail outlet and received these drugs for resale after which he would repay Edward Perry for the narcotics. One time Ware couldn't come up with the money for previously-supplied narcotics. While Edward Perry was upset with Ware for not having the money, he agreed to supply Ware with some more heroin to enable Ware to make up the debt from his profit on future sales.

The evidence is also sufficient to connect defendants Winters and Erwin to the conspiracy. Both in effect concede that approximately one pound of cocaine was delivered to them by a courier of Edward Perry.[2] While Winters argues that

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[2] Winters and Erwin were indicted for the conspiracy because Elise Williams had delivered approximately one pound of cocaine to them.

At page 8 of their opening brief they make this statement:

> "In the instant case, Appellants concede that their participation could inferentially establish that they had conspired with Edward Perry. However, it would be unreasonable to hold that either one of them had knowledge of a conspiracy broader in scope than

no narcotics were ever delivered directly to him and that he did not reside with Erwin, the testimony showed that Elise

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2 (cont'd)

> their individual participation. Appellants' participation is limited to possessing a substance which was never established as being contraband (R.T. 841). Testimony regarding the nature of the substance may present cause for suspicion or conjecture that appellants were illegally involved in a conspiracy to possess controlled substances, but it was equivocal." (emphasis supplied)

We read this paragraph to mean that they conceded delivery of the cocaine, but argued that even so, this would not establish that they knew the breadth of the conspiracy charged in Count Two.

We also read it to say in effect:

> "While we concede delivery of a substance there is no proof that it was cocaine."

Throughout the remaining portion of their brief, they did not argue that there was no delivery, rather they argued that they were not part of the overall conspiracy because they allegedly did not know where Ed Perry got his drugs or who else was involved with Perry. This cocaine was weak, of inferior quality, and could not be sold so it was returned to Ed Perry. Again, at page 8 of Winters' and Erwin's

Williams and Edward Larry Jackson delivered the cocaine to Erwin's house while Winters was present. They all four snorted some of this cocaine. (R.T. 509 and R.T. 652)

Even though Winters may not have resided at the same address as Erwin, Williams and Jackson throughout their testimony say that they delivered the cocaine to "Mike and Brian" (Mike Erwin and Brian Winters) at the home of "Mike and Brian." A strong inference arises that both Winters and Erwin were the recipients of the cocaine package. This inference is corroborated throughout Williams' and Jackson's testimony. For

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2 (cont'd)
brief, they state:

> "Appellants' act of returning the substance is not consistent with the alleged object of the conspiracy to possess with intent to distribute cocaine."

Winters claims at page 12 of his brief that he "never had actual or constructive dominion and control over the substance" at either Erwin's or Perry's home. We question how he can argue the effect of returning something, at the same time claiming he never received it or possessed it.

In any event, both were convicted of conspiracy to possess with intent to distribute cocaine, not with possession and distribution. (Emphasis supplied)

example, one time when Ed Perry (the supplier of the cocaine) and Jackson got together, they talked about the package Jackson had taken up to "Mike and Brian's." Perry told Jackson he was waiting for some confirmation back "as to whether some money had been gotten for it [the package] or not." (R.T. 656).

This package of cocaine was found to be of inferior quality and unsalable and was returned to Ed Perry. After its return, Winters and Erwin came down to Ed Perry's La Jolla house and stayed for two days, apparently waiting to see what was going to happen with this bad package of cocaine. The other co-conspirators (apparently not Winters and Erwin) were to lose their $12,000 investment on this bad package. These other conspirators decided that the loss would have to be made up from future narcotics transactions. It may be legitimately inferred as argued by the government that Winters and Erwin were "preferred customers who had been trusted with the narcotics initially" without being required to "front" any money to obtain the narcotics for resale. (Government brief, p. 55) There was a discussion between Winters, Erwin, Ed Perry and Jackson about the package "not being up to par." (R.T. 657). While Winters participated "very little, if any, concerning narcotics," (R.T. 659), the fact is he was still present.

With Winters and Erwin together and present every time this bad package of cocaine popped up, there is a very strong inference that both Winters and Erwin had an interest in it. The jury (and the

court in Erwin's case) could easily infer that both knew what was going on and that the bad package of cocaine was only returned when Winters and Erwin, as sellers for Ed Perry, could not get their buyers to accept it. Therefore, they had to return it to Ed Perry, their supplier.

Winters and Erwin were also seen at a party where several of the major figures in the overall conspiracy were present, including Ed Perry and defendant Perry.[3]

With this and the other evidence presented at trial, it is clear that this is more than sufficient evidence to connect Winters and Erwin to the conspiracy.

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[3] There is other evidence from Jackson's testimony to connect Winters and Erwin to the overall conspiracy. (R.T. 687-688):

> "Q: Where was the first time you saw this person named Carlos?
> A: In the Ingram downstairs apartment. [an apartment rented by Ed Perry (R.T. 677)]
>
> * * * * * * *
>
> Q: In whose presence was Mr. Carlos when you first saw him?
> A: In Ed Perry's, Mike, Brian and myself.
>
> * * * * * * *

III. VARIANCE

[8] Defendants contend that the proof at trial showed several conspiracies rather than the one conspiracy charged in the indictment. They argue that this is a variance which prejudiced their substantial rights and requires reversal. We disagree. Because we have found, after a reading of the record in this case, that the jury could rationally conclude that there was one general conspiracy and that defendants were members of it, we find that there is no variance between the indictment and the proof adduced at trial which prejudiced defendants' rights. United States v.

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[3] (cont'd)

> Q: Can you tell us who said what?
> A: Ed Perry said that this guy Carlos was capable of getting a connection in Peru and having cocaine . . . brought back and he was going to finance it.
> Q: Mike and Brian were there on that occasion?
> A: Yes.
> Q: Did they take part in the conversaion?
> A: Not really, but Perry did all the talking. They had brought Carlos down with them. (emphasis supplied)
> Q: Mike and Brian had?
> A: Yes.

Jackson saw these people, Ed Perry, Carlos, Mike and Brian together at a later time also. However, this time they were discussing opening a Mexican restaurant. (R.T. 689).

Baxter, supra, P. 160.

Defendants rely on Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). However, the instant case is quite different from the facts which exist in Kotteakos. There, thirty-two persons were indicted for a single conspiracy to violate the National Housing Act by inducing lending institutions to make loans which could be offered to the Federal Housing Administration for insurance on the basis of false and fraudulent information. The evidence proved at least eight different conspiracies consisting of several defendants whose only connection with each other was that all had their fraudulent applications handled by a broker named Brown. Each of these agreements with Brown was a completely separate agreement and had its own distinct illegal end. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. This is different from the instant case in that here the jury could find that each one of the defendants knew or should have known that other retailers were involved and that each had reason to believe that what benefits he received were probably dependent upon the success of the entire venture. United States v. Baxter, supra. The retailer defendants here are much more interested and involved in the general conspiracy than those defendants in Kotteakos, supra. For these reasons, we also distinguish United States v. Griffin, 464 F.2d 1352 (9th Cir.), cert. denied, 409 U.S. 1009, 93 S.Ct. 444, 34 L.Ed.2d 302 (1972).

IV. REBUTTAL TESTIMONY

One of the key witnesses for the prosecution was June Delores Wright. She was a co-conspirator and primarily acted as courier of narcotics for Edward Perry. She took the stand and testified about her own and defendants' involvement in the conspiracy. She also testified as to several collateral matters such as her occupation, her residence and who her relatives were. The defense then presented several inconsistencies in her testimony on these collateral matters. The trial court allowed the prosecution to put Wright back on the stand as a rebuttal witness where she "clarified" the inconsistencies which had been presented.

[9, 10] Defendants contend that Wright's rebuttal testimony was improper and that the trial court abused his discretion by allowing her to retake the stand. We disagree. The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which the trial judge necessarily has broad discretion. Beck v. United States, 317 F.2d 865, 870 (5th Cir. 1963), cert. denied, 375 U.S. 972, 84 S.Ct. 480, 11 L.Ed.2d 419 (1964). The key issue in this instance is the credibility of Witness Wright. If, during rebuttal testimony on the stand, she were to change parts of her earlier testimony (which is what the defense is contending), this would reflect on her credibility, which is one of the ultimate questions for the jury to decide.

Defendants' counsel were allowed great latitude in their cross-examination of Witness Wright into collateral matters. We cannot find that any of the defendants were prejudiced because she was allowed to take the stand in rebuttal. This was no abuse of discretion by the trial court. Federal Evidence Rules, 104(e) and 611 (a)(1).

The contention that the prosecution participated in a ruse to fabricate Wright's testimony, or failed to disclose the falsity of testimony known to it, is not supported by the record.

V. NONDISCLOSURE OF THE IDENTITY OF WITNESS LARRY JACKSON'S FRIENDS

[11, 12] During direct examination of co-conspirator and government witness Larry Jackson, he mentioned that friends of defendant Ware, Ware's wife, and Jackson sometimes stopped by the house and consumed narcotics. On cross-examination, counsel for the defense demanded that Jackson reveal the names of these friends. The trial court ruled that Jackson did not have to reveal the names because they were irrelevant. Defendants contend that they have been denied their right to confrontation of witnesses against them. However, this right necessarily only extends to issues which are relevant to the trial at hand. The trial court is the one best able to determine whether the evidence is relevant or whether counsel is merely fishing amidst the irrelevant evidence hoping to find something of relevance. It is well-established that the scope and extent of

cross-examination is within the trial court's sound discretion. United States v. Bagsby, 489 F.2d 725 (9th Cir. 1973). We find that the identity of Jackson's friends was of questionable relevance and that the trial court properly exercised his discretion in limiting cross-examination in this area.

VI. JURY INSTRUCTIONS

Defendants contend that the proof at trial showed multiple conspiracies, while the indictment only charged one general conspiracy. The trial court instructed the jury on the usual conspiracy instructions to the effect that the conspiracy offense is complete when the jury finds beyond a reasonable doubt that the conspiracy existed, that there was an overt act, and that the defendants were willing members of it. The trial court refused to give defendant Perry's requested instruction which read:

> ". . . if you should find from the proofs in this case that there are two or more disconnected conspiracies, you must not find the defendants in this case guilty of the conspiracy charged in the indictment." (Clerk's Transcript, p. 30)

[13, 14] We find that this multiple conspiracy instruction incorrectly states the law and the trial court, therefore, properly refused it. The crucial point that defendants miss in this case is the fact that the jury could find that there were several different agreements

involving the defendants, all of which would then connect the defendants to the general overall conspiracy as charged in the indictment. The government does not have to prove that all of the defendants met together at the same time and ratified the illegal scheme. This just is not the nature of a conspiracy, especially a large narcotics smuggling and distribution organization as we have here. Generally, the defendants are going to meet and conspire in twos or threes in order to carry out the design of the common overall scheme. To suggest that defendants should be acquitted of the general conspiracy charge just because some of them met singly with other defendants and conspired with them to carry out the overall common distribution plan is a misapplication of the law of conspiracy. By these separate agreements the defendants became parties to the larger common plan, joined together with their knowledge of its essential features and scope, though not of the exact limits, and by their single goal. These agreements were merely steps in the formation of the larger and more general conspiracy. See Blumenthal v. United States, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947).

[15, 16] We do not mean to suggest that a correct instruction on multiple conspiracies would be improper in this and similar cases. When the possibility of a variance appears between the indictment and the trial proof, the trial court should instruct the jury on multiple conspiracies. United States v. Varelli, 407 F.2d 735, 746 (7th Cir. 1969). See e.g. United States v. Griffin, supra.

However, because of our finding, supra, that there is no such variance in the instant case, the failure of the trial court to instruct on multiple conspiracies caused no harm or prejudice to the defendants and, as such, is not reversible error.

Other contentions raised by defendants have been studied and we find them to be without merit.

AFFIRMED.